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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1941.

OCCIDENTAL LIFE INSURANCE COMPANY, a Corporation,
Petitioner,

vs.

SOPHIE EILER,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
and
SUPPORTING BRIEF AND ARGUMENT.

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IN THE

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OCTOBER TERM, 1941.

OCCIDENTAL LIFE INSURANCE COMPANY, a Corporation,
Petitioner,
vs.
SOPHIE EILER,
Respondent.

PETITION FOR A WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

The petition of Occidental Life Insurance Company, a corporation, respectfully shows to this Honorable Court:

SUMMARY STATEMENT OF THE MATTER INVOLVED.

In this action, originally instituted against petitioner in the state court of Missouri (R. p. 6) and subsequently removed to the federal court (R. p. 10), the respondent sought to recover of petitioner the sum of $3,500 under the double indemnity or accidental death benefit of a policy of life insurance for $5,000 issued on January 31,

1921, by the Guaranty Life Insurance Company (later reinsured by petitioner) to and upon the life of Henry Eiler, in which respondent was the beneficiary, together with a penalty of $350 and a reasonable attorney's fee, on the ground that petitioner's refusal to pay was vexatious.

Following the insured's death, which was the result of suicide (R. p. 169), the Guaranty Life Insurance Company paid the respondent, the beneficiary of the policy, the sum of $5,000 under the life insurance benefit of the policy, no claim having then been made under the double indemnity benefit of the policy (R. p. 144). About a year later, however, the respondent did make claim under the double indemnity benefit of the policy on the ground that the insured was insane when he committed suicide (R. p. 51). Following that claim, petitioner, through its agent at St. Louis, Missouri, entered into negotiations with respondent for a settlement of that claim, with the result that respondent agreed to accept $1,500 in full settlement of her claim under that benefit, which amount was paid to her and for which she executed a written release of all claims under the double indemnity benefit of the policy (R. pp. 33, 58-60, 85).

About a year later the respondent, through her counsel, made demand upon petitioner for the additional sum of $3,500 under the double indemnity benefit, and upon petitioner's refusal to pay the same, respondent filed this suit, in which she alleged that the insured's death was the result of an insane suicide; that petitioner had previously paid respondent the sum of $1,500 under the double indemnity benefit of the policy, but that it had vexatiously refused to pay the additional sum of $3,500 alleged to be due thereunder.

Petitioner in its answer (R. p. 16) pleaded in bar of the action the release by respondent of all claims under the double indemnity benefit of the policy in consideration of the payment to her of the sum of $1,500; denied that the

insured was insane when he committed suicide, and denied that it had vexatiously refused to pay respondent the additional sum of $3,500 claimed to be owing under that benefit.

To this answer respondent filed a reply (R. p. 20), in which she alleged that when this release was executed, there was no bona fide dispute or controversy between the parties concerning the defendant's liability under the double indemnity benefit of the policy, and that the release was procured through false and fraudulent representations on the part of petitioner's agent.

There being no allegation either in the petition or in the reply that respondent had returned or offered to return or had tendered into court the sum of $1,500 paid to her by petitioner for her release of all claims under the double indemnity benefit of the policy, petitioner filed a motion in the District Court for judgment on the pleadings on the ground that the return to petitioner of this sum of $1,500 was a condition precedent to respondent's right to maintain an action against petitioner under the double indemnity benefit of the policy (R. p. 26). That motion was overruled by the District Court (R. p. 27). Petitioner also objected at the trial to the introduction of any evidence by respondent in avoidance of the release because no tender of the return of the sum of $1,500 paid for this release had been made to petitioner, which objection was also overruled by the District Court (R. p. 36).

At the trial respondent produced evidence that the insured was insane prior to the time he killed himself. However, the respondent introduced in evidence the following suicide note left by the insured:

> "To nervous Could not stand it any longer Nobody's fault Bury me at Mattese cemetery Father Schlattmann—Fendler undertaker Did not take time to wash" (R. p. 49).

There was a finding and judgment by the District Court in favor of respondent for the sum of $3,500, and interest thereon of $877.37, together with the sum of $350 as a penalty and $1,000 as an attorney's fee for the vexatious refusal of the defendant to pay the additional sum of $3,500 under the double indemnity benefit of the policy (R. p. 190).

Appeal to Court of Appeals.

On petitioner's appeal from that judgment the Court of Appeals held that under the Missouri law the release of all claims under the double indemnity benefit of the policy was void for lack of a bona fide dispute or controversy between the parties; that the return of the sum of $1,500 paid by petitioner to respondent for that release was not a condition precedent to the right of respondent to maintain an action against petitioner on the double indemnity benefit of the policy; that the suicide note left by the insured was insufficient to raise any reasonable doubt as to his insanity at the time he killed himself and that the facts brought the case within the operation of Sec. 6040, R. S. Mo. 1939, which authorizes the allowance of a 10 per cent penalty and reasonable attorney's fee against the insurer if it vexatiously refuses to pay the amount adjudged to be due and owing by it under a policy. In addition, the Court of Appeals also held that petitioner's appeal from the judgment of the District Court was vexatious and had been taken merely for the purpose of delay, and for that reason and on the authority of Sec. 1230, R. S. Mo. 1939, it awarded respondent additional damages in the sum of 10 per cent of the amount of the judgment of the District Court (R. 196-209).

Following a petition for rehearing (R. p. 211), in which petitioner contended that the Missouri Legislature was without authority to prescribe a penalty for a vexatious

appeal from a judgment of a District Court of the United States, the Court of Appeals in a per curiam opinion (R. p. 223) held that if the imposition of that penalty was not warranted by the Missouri statute, it was justified by Sec. 878, 28 U. S. C. A., and Rule 31 of the Court of Appeals, which provides that if it shall appear to the Court that an appeal is taken merely for delay, damages at a rate not exceeding 10 per cent shall be awarded upon the amount of the judgment or decree of the District Court.

REASONS RELIED ON FOR ALLOWANCE OF WRIT.

1. The holding of the Court of Appeals that respondent's release of all claims under the double indemnity benefit of the policy was void because of the lack of a bona fide dispute or controversy, notwithstanding the issue of the insured's insanity when he committed suicide, would have been one for the determination of the jury in an action to recover under the double indemnity benefit of the policy, and that repayment of the consideration paid for that release was not a condition precedent to the maintenance of this action, involves an important question of local (Missouri) law and said holding is either in conflict with the applicable decisions of the Missouri courts or is probably untenable under the Missouri law as yet unannounced by the appellate courts of that state.

2. The holding of the Court of Appeals that petitioner's refusal to pay the claim sued on was vexatious and that the imposition by the District Court of a penalty of $350 and an attorney's fee of $1,000 was proper under Sec. 6040, R. S. Mo. 1939, involves an important question of local law which is in conflict with the applicable decisions of the appellate courts of Missouri.

3. The holding of the Court of Appeals that petitioner's appeal from the judgment of the District Court was vexa-

tious and was taken merely for the purposes of delay and the imposition therefore (either under Sec. 1230, R. S. Mo. 1939, or under its Rule 31) of an additional 10 per cent of the amount of the judgment of the District Court, involves an important question of federal law or practice which is contrary to the previous holding of this Court in McKee v. Rains, 10 Wall. 22, 26, 19 L. Ed. 860, 862, if the holding of the Court of Appeals is predicated on its Rule 31, and which renders Section 1230, R. S. Mo. 1939, unconstitutional, if the holding is predicated on that statute.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Circuit Court of Appeals, Eighth Circuit, commanding that Court to certify and send to this Court for its review and determination, on a day certain to be named therein, a full and complete transcript of the record and all proceedings in case numbered 11,990 on its docket and entitled "Occidental Life Insurance Company, a corporation, Appellant, v. Sophie Eiler, Appellee," and that the said judgment of the Circuit Court of Appeals, Eighth Circuit, be reversed by this Honorable Court, and that your petitioner may have such relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

OCCIDENTAL LIFE INSURANCE CO.,
a Corporation,

By JAMES C. JONES,
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St. Louis, Missouri,
Counsel for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI.

I.

OPINION OF COURT OF APPEALS.

The opinion of the Circuit Court of Appeals, Eighth Circuit, is reported in 125 F. 2d 229, and is set out on pages 196 to 210 of the record filed herein. The subsequent per curiam opinion of the Court of Appeals on the petition for a rehearing is set out on page 223 of the record.

II.

JURISDICTION.

The jurisdiction of this Court is invoked under Sec. 240(a) of the Judicial Code as amended by the Act of February 13, 1925, 43 Stat. 938 (28 U. S. C. A., Sec. 347).

The judgment of the Circuit Court of Appeals, Eighth Circuit, affirming the judgment of the District Court for the Eastern District of Missouri, was entered on January 27, 1942 (R. p. 209), and the petition for rehearing was denied on March 7, 1942 (R. p. 223). Thirty days' stay of mandate was granted on March 18, 1942 (R. p. 224).

The following cases are believed to sustain the jurisdiction of this Court:

Ruhlin v. New York Life Ins. Co., 304 U. S. 202, 206;
Lyon v. Mutual Benefit H. & A. Co., 305 U. S. 484;
Erie R. R. Co. v. Tompkins, 304 U. S. 64;
Wichita Royalty Co. v. City National Bank of Wichita, 306 U. S. 103;
Equitable Life Insurance Co. v. Halsey, Stuart & Co., 312 U. S. 410;
Stoner v. New York Life Ins. Co., 311 U. S. 464;
Brisch v. Central R. R. of N. J., 312 U. S. 484, 486.

III.

STATEMENT OF CASE.

Under the heading A, in the petition *ante*, is a statement of the case so far as it is material to the consideration of the question presented, and in the interest of brevity is not repeated here.

IV.

SPECIFICATION OF ERRORS.

1. The holding of the District Court that under the decisions of the state courts of Missouri respondent's release was void and that respondent was not required to return to petitioner the sum of $1,500 paid to her for such release as a condition precedent to respondent's right to maintain an action against petitioner under the double indemnity benefit of said policy, is contrary to the law as declared by the Missouri courts in:

> Och v. Missouri, K. & T. Ry. Co., 130 Mo. 27, 46, 31 S. W. 962, 966;
> Reed v. John Gill & Sons Co., 201 Mo. App. 457, 462, 212 S. W. 43, 45.

2. The holding of the Court of Appeals that the suicide note left by the insured did not establish his sanity as a matter of law is not sustained by the Missouri law and is contrary to the holding in Gates v. Travelers Insurance Co. (Mo. App.), 218 S. W. 927.

3. The holding of the Court of Appeals that petitioner's refusal to pay the additional sum of $3,500 under the double indemnity of the policy was vexatious under Sec. 6040, R. S. Mo. 1939, and that the District Court had properly assessed a penalty of $350 and an attorney's fee of $1,000 against petitioner under that statute is not justified by, but is in conflict with, the interpretation placed upon

that statute by the Supreme Court of Missouri, in the following cases:

State ex rel. Gott v. Fidelity & Deposit Co., 317 Mo. 1078, 1095, 298 S. W. 83, 91;
Aufrichtig v. Columbian National Life Ins. Co., 298 Mo. 1, 16, 249 S. W. 912, 917.

4. The holding of the Court of Appeals that petitioner's appeal from the judgment of the District Court was taken merely for the purposes of delay and that petitioner was therefore liable, either under Section 1230, R. S. Mo. 1939, or under Sec. 31 of the Rules of the Court of Appeals, for an additional 10 per cent of the amount of the judgment of the District Court cannot be sustained under said statute and the construction so placed by the Court of Appeals on its Rule 31 under the facts of this case is violative of fundamental principles of justice.

Aetna Life Ins. Co. v. Kennedy, 301 U. S. 389, 395;
Chateaugay Iron Co., Petitioner, 128 U. S. 544, 553;
Louisiana v. Jack, 244 U. S. 397, 403;
McKee v. Rains, 10 Wall. 22, 26, 19 Wall. 860, 862.

V.

ARGUMENT.

I.

The Holding of the Circuit Court of Appeals That There Was No Bona Fide Dispute or Controversy Between the Parties at the Time of Respondent's Execution of the Release of All Claims Under the Double Indemnity Benefit of the Policy and That Therefore a Return to Petitioner of the Consideration Paid for That Release Was Not a Condition Precedent to Respondent's Right to Maintain an Action Against Petitioner on the Double Indemnity Benefit of the Policy, Is Not Sustained or Supported by the Missouri Law, But Is Contrary to the Law as Announced by the Courts of That State.

The Court of Appeals, in holding that there was no bona fide dispute or controversy between the parties at the time the release was executed, cites the following Missouri cases:

Yancey v. Central Mutual Ins. Assoc., 77 S. W. (2d) 149 (Mo. App.);
Crowder v. Continental Cas. Co., 155 Mo. App. 535, 91 S. W. 1016;
Fowler v. Mutual Ins. Assoc. (Mo. App.), 86 S. W. (2d) 946;
Enright v. Schaden (Mo. App.), 242 S. W. 89;
Berry v. Detroit Cas. Co. (Mo. App.), 300 S. W. 1026;
Sappington v. Central Mutual Life Ins. Assoc., 229 Mo. App. 222, 77 S. W. (2d) 140;
Price v. Cannon, 3 Mo. 453;
Barrett v. Kern, 141 Mo. App. 5, 121 S. W. 774;
Schreibner v. Central Mutual Life Ins. Co. (Mo. App.), 108 S. W. (2d) 1052.

In those cases, however, the asserted defense was either (1) that the policy had been procured by *fraudulent representations* in the application or (2) that liability under the policy was excluded by *an express exception or delimiting clause in an otherwise assumed liability*, or (3) that the policy had *terminated prior* to insured's death. Such a defense in an action to recover on the policy would, of course, be *an affirmative defense*, as to which the defendant would have the *burden of proof*, and absent any evidence of such defense, the plaintiff would be entitled to a *directed verdict*.

In the case here, however, the dispute which was compromised and released did not involve any such claim or assertion. Petitioner asserted *no affirmative defense*. It merely *denied* that insured's death was accidental. As to this the *plaintiff* had the *burden of proof*. In other words, the controversy here concerned plaintiff's *right of recovery* under a contract *which only insured against an accidental death*, as to which the *burden of proof* was on the claimant. It had naught to do (as in the Missouri cases cited by the Court of Appeals) with a *defense* of *misrepresentation* in the procurement of the policy or with a clause *excluding* or *delimiting* liability in particular exigencies or that the policy had terminated prior to insured's death.

The distinction between the cases relied on by the Court of Appeals and a case of the character here involved is succinctly pointed out by the Missouri Supreme Court in Griffith v. Continental Casualty Co., 290 Mo. 455, 461, 235 S. W. 83, 85, where the Court, in an action *on an accident* policy, said:

> "The answer averred that his death 'was due to suicide and self-destruction.' This averment *was equivalent* merely to *a denial* that the insured's death was caused through *accidental* means by *accidentally*

falling out of a window. It did *not assert* that his death came *within some exception* of the *policy* for which defendant was not liable; *nor* did it *tender* an *affirmative defense* in *any sense. If the petition* in properly declaring on the policy had *predicated liability merely* on the *death* of the insured, and the defendant had by its answer *sought* to limit its liability under the policy by setting up a particular manner of death, the answer would *to that extent* have set up an *affirmative* defense. But it was *necessary* for the *petition* to allege, as it *did,* that the insured's death was caused by *accidental means,* and, as stated, the answer *denied* that it was so caused, with an incidental admission of liability to the extent of $1500 on the ground that insured had committed suicide. *The issue* would have been *just* the *same* had the answer been a *general denial.*"

The claim which respondent asserted under the double indemnity benefit of this policy when the release was executed was that insured's death was *accidental* because it was the result of an *insane suicide.*

If there had been no release and respondent had instituted an action on the double indemnity benefit of the policy, she would, under the Missouri law, *have had the burden of proving that the insured was insane* [Scales v. National Life & Acc. Ins. Co. (Mo. Sup.), 212 S. W. 8, 9; Fendler v. Roy, 331 Mo. 1083, 1094, 58 S. W. 2d 459, 464; Griffith v. Continental Casualty Co., 290 Mo. 455, 462, 253 S. W. 1043; Rubinstein v. New York Life Ins. Co. (Mo. Ap.), 153 S. W. 2d 760; Laventhal v. New York Life Ins. Co. (D. C., Mo.), 40 F. Supp. 157].

Since *respondent,* in an action to recover the accidental death benefit of the policy, *would have had the burden of proving* that the *insured was insane* when he killed himself, and since *that issue* would have been *for the determination of the jury,* it necessarily follows that *respond-*

ent's right of recovery would have *depended on* the *finding* of *the fact of insanity* by *the jury.* Until evidence of insured's insanity was introduced and the *finding made,* it could not possibly be foretold WHAT WAS THE FACT. In view of the *presumption of sanity,* how can it possibly be held, when the parties *compromised* this claim, that there was *no doubt* of petitioner's liability on the claim made? If there was such doubt, the compromise and release was justified. Both parties recognized this inherent doubt and so compromised the claim. Any claim which involves an issue of fact determinable only, as here, by evidence *in pais,* and by the verdict of a jury, can *never be said to be so free from doubt* that a *compromise* and *release* of the claim *is invalid.*

Respondent, unwilling to risk the entire sum of $5,000 payable under the double indemnity benefit upon her ability to satisfy a jury that the insured was insane when he suicided, accepted $1,500 in settlement of that claim. The Court of Appeals in permitting respondent to ignore that settlement and to recover on a claim previously released, while still retaining the consideration paid therefor, failed to follow the law as previously declared by the Missouri Supreme Court in Och v. Missouri, K. & T. Ry. Co., 130 Mo. 27, 46, 31 S. W. 962, 966, in which the Court said:

> "If the money received by Mrs. Och was in consideration of a settlement of all injuries which might result to her in consequence of the accident, the *retention of it* after it became known to her that the release was obtained through fraudulent representation, and after she had decided to sue therefor, *and to ignore said settlement,* was as *inconsistent with justice and fair dealing* as was the conduct of defendant's agent in obtaining from her a release through fraud and deceit, if such was the case. * * *
>
> "The *law* will *not permit plaintiff* to *retain the fruits* of the *settlement* and at the *same time ignore it* as if obtained by fraud. It will *not permit her to re-*

tain the money she received under the contract of settlement if in satisfaction of her entire claim and *yet proceed in disaffirmance* thereof (cases). *Until repudiation* of *the contract* of *settlement plaintiff had no cause of action.* Under such conditions 'something must then be *done* by the party defrauded *before* the *contract can cease* to *be binding;* so that it is specific performance reversed, the literal undoing * * * of the contract.' 1 Bigelow, Fraud, p. 74; * * *.

"*Settlements* and releases apply *alike* to all kinds of claims, whether arising *from contract or tort.* There can be no reason why it should not be so, and the authorities which hold to the contrary cannot be sustained on reason or authority."

The holding of the Court of Appeals is likewise contrary to the holding in Reed v. John Gill & Sons Co., 201 Mo. Ap. 457, 462, 212 S. W. 43, 45, in which the Court said:

"But aside from and waiving all this, there is another reason which disposes of plaintiff's right to recover in this case, and that is *he did not put himself in a position to disavow* the *settlement* by *returning* or offering to return, the *fruits of the settlement before instituting the suit.*"

II.

The Suicide Note Left by the Insured Established His Sanity as a Matter of Law.

In the suicide note left by the insured he stated that the act which he was about to commit was "nobody's fault," and he also designated in that note the *priest* who was to perform the last religious rites, the undertaker who was to bury his body, and the cemetery in which his body was to be interred. In Missouri an insured is insane when he is unable to appreciate the moral consequences of his act (Rodgers v. Travelers Insurance Co., 311 Mo. 249, 278 S. W. 368).

With respect to this note the Court of Appeals said (R. p. 208):

> "The circumstances of the writing were insufficient to raise any reasonable doubt as to the insanity."

With all due respect to the Court of Appeals, we submit that this was an insufficient answer.

This note shows that the insured knew and understood that his life was about to terminate *by his act* and at the very moment of committing "self murder" he says in that note that it was nobody's "fault," thus using the appropriate term "fault" as understood by everyone, which is a failure to do what is right or a transgression of the *moral law.* The lexicographers generally so define fault and in its relation to morals give no other definition.

Therefore, this note discloses emphatically and uncontrovertibly that the insured understood, and quite well understood, the moral as well as the physical consequences of the act which he was about to commit and did commit. So to understand evinces sense, *not madness*—else the whole world has gone mad.

In Gates v. Travelers Insurance Co. (Mo. Ap.), 218 S. W. 927, the Court held that a suicide note left by the insured established his sanity as a matter of law at the time he killed himself and the holding of the Court of Appeals in the case at bar that the suicide note did not raise any reasonable doubt as to insured's insanity cannot be sustained under the holding of the Missouri court in the Gates case. It is true that the Court in the Gates case held that the test of the insured's insanity was his ability to appreciate the physical consequences of his act, whereas the Missouri Supreme Court in the subsequent case of Rodgers v. Travelers Insurance Co., supra, held that the proper test of insanity was the ability of the insured to appreciate the moral consequences of his act, but the suicide note

in the case at bar shows that the insured appreciated *both the physical and the moral consequences* of the act he was about to commit.

III.

The Holding of the Court of Appeals That the District Court Properly Imposed a Penalty and Attorney's Fee Upon Petitioner Because Its Refusal to Pay the Balance Claimed to Be Due and Owing by It Was Vexatious Under Section 6040, R. S. Mo. 1939, Is in Conflict With the Decisions of the Missouri Courts.

Sec. 6040, R. S. Mo. 1939, provides as follows:

> "In any action against any insurance company to recover the amount of any loss under a policy of fire, cyclone, lightning, life, health, accident, employers' liability, burglary, theft, embezzlement, fidelity, indemnity, marine or other insurance, if it appear from the evidence that such company *has vexatiously refused to pay such loss*, the court or jury may, in addition to the amount thereof and interest, allow the plaintiff damages not to exceed ten per cent on the amount of the loss and a reasonable attorney's fee; and the court shall enter judgment for the aggregate sum found in the verdict."

The Court of Appeals justifies the District Court in finding that defendant's refusal to pay the amount sued for by respondent was vexatious under this statute.

No Missouri case holds that a release is void in a case of claimed liability under an *accident* policy where liability is denied on the ground that the insured's death was not within the contracted coverage, i. e., was *not accidental*.

No Missouri case holds that a release is void in a case of claimed liability under an accident policy on the ground that the insured's death was the result of an insane suicide where the proof of insanity rests *in pais*.

No Missouri case holds that the return of the consideration paid to the beneficiary for the release of her claim under an accident policy on the ground that the insured's death was the result of an insane suicide was not required as a condition precedent to her right to maintain a subsequent action to recover on the policy.

No Missouri case holds that a suicide note left by the insured, which shows his intent to commit suicide and an appreciation and understanding of the wrongfulness of the act which he was about to commit, is not indisputable evidence of his sanity.

A contest by petitioner of its liability for the additional sum of $3,500.00 claimed to be due and owing by it under the double indemnity benefit of the policy was, we submit, justified and warranted under one or all of the foregoing grounds. In any event, a lawyer would be reasonably justified and warranted in advising petitioner to contest, on one or all of the foregoing grounds, the claim against it for the additional $3,500.00 under the double indemnity benefit of said policy *in view of the absence of any controlling decisions in Missouri holding that* a contest of liability was not justified on any of these grounds. If so, then under the construction placed upon Sec. 6040, R. S. Mo. 1939, by the Missouri courts, the refusal of petitioner to pay the additional sum of $3,500.00 under that statute was not vexatious and it was improper for the District Court to assess against petitioner the statutory penalty and attorney's fee which it did assess.

In State ex rel. Gott v. Fidelity & Deposit Co., 317 Mo. 1078, 1095, 298 S. W. 83, 91, the Court said:

> "The legal questions raised by the respondent's position were such *that lawyers might well differ honestly* and *reasonably, thereon.* In these circumstances it *was error to submit the question of vexatious delay.*"

If petitioner had declined to pay anything in settlement of the claim under the double indemnity benefit of the policy, and respondent had sued to recover the full amount of that benefit, charging that insured's death was due to an *insane suicide*, then the District Court, under the holding of the Missouri Supreme Court in Aufrichtig v. Columbian National Life Ins. Co., 298 Mo. 1, 249 S. W. 912, *could not have found that the refusal to pay* was vexatious. The Aufrichtig case was an action to recover under an accidental death benefit of a life insurance policy on the ground that insured's death was the result of an *insane suicide*. The Missouri Supreme Court, despite an adverse judgment against the company in the trial court, held that the company *had* a *right* to *contest* plaintiff's claim *without penalty*, and that the trial court erred in assessing against the company a penalty (damages and attorney's fees) under what is now Section 6040, R. S. Mo. 1939. The Court said (298 Mo., l. c. 16, 249 S. W., l. c. 917):

> "In the case before us there was the single issue of fact whether or not self-destruction of the deceased was done *while sane or insane*. The record of evidence discloses *no bad faith* in *contending* that deceased was *sane* at the time. It will *not do* to say that insurance companies acting in good faith may not contest either *an issue of fact* or an *issue of law without subjecting itself to the penalties of the statute supra.*"

If contest of the whole amount in such case is justified and so precludes the assessment of damages and attorney's fees, then how could the Court of Appeals justifiably uphold the allowance of damages and attorney's fees when this action was for the recovery of less than the whole amount? Under the holding of the Court of Appeals an insurer which *settles* and *compromises* a claim under an accident policy in Missouri *lays itself open* to *greater pains and penalties in a subsequent action to recover* the

balance claimed to be due on the policy than it would have *incurred if it had* disclaimed *all liability under* the policy and *had refused* to settle and compromise the claim.

We submit that the holding of the Court of Appeals in this case is contrary to the holding of the Missouri Supreme Court in the Gott and Aufrichtig cases, supra.

IV.

The Imposition by the Court of Appeals of Additional Damages Against Petitioner of 10 Per Cent of the Amount of the Judgment of the District Court on the Ground That Petitioner's Appeal From That Judgment Was Vexatious and Was Taken Merely for the Purposes of Delay, Is Neither Justified by Sec. 1230, R. S. Mo. 1939, nor by Rule 31 of the Court of Appeals.

The Court of Appeals undertakes to justify the imposition against petitioner of the additional 10 per cent of the amount of the judgment of the District Court on the ground that its appeal from the judgment of the District Court was vexatious and was taken for the purpose of delay, either under Sec. 1230, R. S. Mo. 1939, or under its Rule 31.

Sec. 1230, R. S. Mo. 1939, provides:

> "Upon the affirmance of any judgment or decision, or upon the dismissal of any case, the supreme court and courts of appeal may award to the appellee or defendant in error such damages not exceeding ten per cent of the amount of the judgment complained of as may be just, and when such judgment shall be affirmed for part of the sum for which judgment was rendered by the trial court, such part of said judgment shall bear lawful interest from the date of the rendition of the original judgment in the trial court."

Manifestly, however, the Missouri Legislature has no constitutional power to prescribe a penalty *for a vexatious*

appeal from a judgment of a *District Court of the United States. Only Congress has any such power.*

In Chateaugay Iron Co., Petitioner, 128 U. S. 544, 553, the Court said:

> "We are of the opinion that the practice and rules of the state court do not apply to proceedings in the Circuit Court *taken for the purpose of reviewing* in this court a judgment of the Circuit Court * * *."

In Louisiana v. Jack, 244 U. S. 397, 403, the Court said:

> "This claim cannot be seriously entertained in the face of the long time perfectly settled law that equity suits in federal courts and *appellate procedure in them are* regulated exclusively by *federal statutes* and *decisions unaffected by statutes* of the states."

In Aetna Life Ins. Co. v. Kennedy, 301 U. S. 389, 395, the Court said:

> "The Conformity Act does not extend to the Circuit Court of Appeals."

The holding of the Court of Appeals, in so far as it undertakes to justify the imposition of this additional penalty for a vexatious appeal by Section 1230, R. S. Mo. 1939, is squarely in contravention of the foregoing decisions of this Court.

Rule 31 of the Circuit Court of Appeals, Eighth Circuit, provides:

> "2. In all cases where proceedings in this court shall delay the proceedings on the judgment of the inferior court, and shall appear to have been taken merely for delay, damages at a rate not exceeding 10 per cent in addition to interest, shall be awarded upon the amount of the judgment or decree."

We believe we have previously demonstrated that petitioner was justifiably entitled to a review by the Court

of Appeals of the factual, as well as the legal, issues involved herein without being subjected to further and additional penalties for so doing. *Especially* is this so when the Missouri courts have *not previously dealt with a case* involving a *compromise* and *settlement* of a *claim* under an *accident policy* on the ground of an *insane suicide.*

In McKee v. Rains, 10 Wall. 22, 26, 19 L. Ed. 860, 862, this Court held that damages should not be assessed on the ground that a writ of error was sued out merely for delay where, at the time the writ of error was sued out, there were no controlling decisions on the question at issue and said:

> "The counsel for the defendant in error asks, under the 23d Rule, that the order may be affirmed with damages at the rate of 10 per cent per annum on the amount of the judgment in the state court. If, upon the application for removal, the decisions of this Court recently made had been announced, there might be ground for argument that the writ of error had been sued out merely for delay. But it must be remembered that at the time of suing out the writ of error in this case, all questions settled by those decisions were seriously controverted.
>
> "We cannot say, therefore, that the writ of error was not prosecuted in good faith, and in the expectation of obtaining a reversal of the order."

The holding of the Court of Appeals in this case that petitioner's appeal from the judgment of the District Court was vexatious and was taken merely for the purpose of delay and that it was therefore liable for an additional 10 per cent of the amount of the judgment of the District Court, despite the fact that there was no controlling decision of the Missouri courts in a case involving the release of a claim under an accident on the ground that the in-

sured's death was the result of an insane suicide is, we submit, contrary to the holding of this Court in the McKee case, supra.

CONCLUSION.

In this case the Court of Appeals decided important legal propositions and ascribed thereto the attribute or appellation *that such is the law of Missouri.* Examination of the Missouri decisions cited by the Court of Appeals discloses that *they do not decide the law as announced by the Court of Appeals.* As the result of its erroneous conception or assumption of the law of Missouri, the Court of Appeals has debarred itself from deciding the questions involved, whereby petitioner has been deprived of a full review of the case which the law accords it. That this Court will issue its writ of certiorari under such circumstances is well settled.

> "The Rules indicate that the Court will *be persuaded* to grant certiorari where a Circuit Court of Appeals 'has decided an *important question* of *local law* in a way *probably* in *conflict* with *applicable local decisions.*' No such showing was attempted by the petition. Nor was it contended that the decision below was 'probably untenable' and therefore *probably in conflict* with the *state law* as yet *unannounced by the highest court of the state.*"
>
> Ruhlin v. New York Life Insurance Co., 304 U. S. 202, 206.

Here petitioner has pointed out that which was omitted by petitioner in the Ruhlin case, i. e., that the law of Missouri, as announced by the Court of Appeals in the determination of *some* of the *questions* involved, is squarely *in conflict* with the pronouncement of the Court of Appeals, and that in the determination of *other questions* the

unannounced *law* of *Missouri* is *probably in conflict* with *the law as* announced by the Court of *Appeals in this case.*

To the same effect is Brisch v. Central Railroad of New Jersey, 312 U. S. 484, 486, in which the Court said:

> "We granted certiorari because of an alleged conflict *on a question of local law* between the *judgment below* and Miller v. Reading Company, 292 Pa. 44, 140 Atl. 618."

Respectfully submitted,

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No. 1148

MAY 7 1942

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1941.

OCCIDENTAL LIFE INSURANCE COMPANY, a Corporation,
Petitioner,

vs.

SOPHIE EILER,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

STATEMENT.

The opinion and points of decision of the Circuit Court of Appeals for the Eighth Circuit are reported in 125 Fed. (2nd) 229, and set forth on pages 196 to 210 of the record filed herein.

The respondent's pleadings (petition and reply) are predicated on the fact that the insured was insane at and prior to his death by suicide; that the acceptance by the respondent of the $1,500 paid by the petitioner constituted but a partial payment on the $5,000 accidental death benefit due under the policy, and that the purported release

taken by the petitioner was void for lack of consideration as the amount involved was fixed and no bona fide controversy existed (R. 6-9, 20-26).

The respondent's evidence (the **only** evidence presented touching on the insured's mental condition) consisted partially of the testimony of three psychiatrists who had treated the insured over a period of years, and showed without qualification that the insured was insane at the time of his death and had been continuously for several years prior thereto (R. 100-130); that no hospitalization would have helped him (R. 103); that no special therapy could have reached his condition, and no treatment could have restored him to mental health or sound mind (R. 104). These psychiatrists, in answer to hypothetical questions which, aside from their examinations and treatment of the insured, took into consideration the insured's strange and unusual conduct, as shown by other evidence, and the rambling note introduced in evidence by the respondent (which note until that moment was wholly unknown to the petitioner), expressed opinions that the insured was insane at the time of his death (R. 105-110, 119-124, 128-130). The respondent and other lay witnesses testified to the delusions and hallucinations of the insured and other weird actions and conduct on his part (R. 42-44, 72-77, 89-92, 95-97, 98-100); that two of insured's sisters had been confined to a Missouri State Insane Asylum (R. 92, 93); and that the insured himself had been confined to the same hospital for the insane as well as another psychopathic hospital (R. 73).

The evidence further disclosed that, following the insured's death, the respondent requested of the petitioner, through its agent, the double indemnity benefit due under the policy and advised said agent that the insured was nervous and had been in mental hospitals, and was mentally deranged, but the agent stated that double indemnity

was not paid "in suicide and mental cases" (R. 51-56, 78, 79). On a subsequent occasion respondent again requested payment of the accidental death benefit under the policy and again told the petitioner's agent about the insured's mental derangement and that the insured had been confined to hospitals for the insane, and invited the agent to verify her statements (R. 52, 79). Petitioner had been furnished with proofs of death and a coroner's certificate immediately following the insured's death, which showed that the insured came to his death from a gunshot wound, self-inflicted, and that he was known to have been mentally deranged for two years or more. These forms of proof and coroner's certificate were furnished respondent by the petitioner's agent, returned to and approved by said agent, and forwarded to petitioner's home office (R. 169, 170, 172-174, 46, 78, 142). When respondent for the second time advised the petitioner's agent of the insured's insanity and again requested payment of the double indemnity benefit, the agent phoned the petitioner's home office and advised it of the statements and demand made (R. 54, 55, 80, 149). Petitioner thereafter paid $1,500, stating that the company did not owe respondent anything but was just giving her the money to get the matter straightened out before consolidation of the two companies took place (R. 53, 80).

The petitioner's sole witness was its agent, who **admitted** that the respondent told him about the unbalanced condition of the insured's mind when she requested the double indemnity, and told him that the insured was nervous, unbalanced and insane (R. 148, 161, 162). He told the respondent that the company did not pay double indemnity for accidental death, or for self-inflicted death, or for suicide (R. 147). He made no investigation or otherwise concerned himself about the insured's insanity, contending that it was none of his business (R. 162):

"Q. If this matter came to your attention that Mr. Eiler was insane, you knew, of course, he committed suicide also, did you not? A. Yes.

Q. Your answer is 'yes,' so the record will be straight? A. Yes.

Q. Did you make any investigation, or do anything about it further than call the home office? A. I did not.

Q. Did you never make any inquiry to determine whether he was sane or insane? A. I did not. It was none of my business.

Q. Did you inquire about what doctors might have treated him or what hospitals he was in? A. I did not.

Q. In other words, after they told you of the insanity, you never concerned yourself to even find out whether it was true or not true? A. No, I was never delegated to do that."

The agent testified that it was his business to make out proofs of death and forward them to the company. He always saw the proofs of death furnished by the company (R. 142).

BRIEF.

I.

The opinion of the Circuit Court of Appeals for the Eighth Circuit in this cause, under the circumstances disclosed by the record, is completely in accordance with the law of the State of Missouri. The holdings of the courts in this state to the effect that payment of a part of an indebtedness, unquestionably due on a liquidated amount payable under an insurance policy, is no consideration for release of the balance; and that the payment of a part upon a dispute raised in bad faith without any reasonable ground therefor will avail nothing as a consideration for a release of the balance; and that a settlement paid to the beneficiary for a lesser amount and the release taken for said lesser amount is void; and that a party suing under such circumstances for the balance of the amount due, on the ground that the release was void, need not tender back the amount paid under the circumstances; is, we submit, so clearly the law that it is not even open to question. The cases cited by the Court of Appeals in its opinion, together with the additional authorities noted below, fully support this proposition.

Goodson et al., Resp., v. National Masonic Accident Assn., App., 91 Mo. App. 339;

Section 934, Revised Statutes of Missouri 1939 (Sec. 654, R. S. Mo. 1899).

II.

The evidence overwhelmingly showed the insured's accidental death by suicide while insane.

Rodgers v. Travelers Ins. Co., 311 Mo. 249, 278 S. W. 368.

III.

The refusal of petitioner to pay respondent the balance due her under the accidental death benefit of the policy was, under the facts in this case, vexatious, and the trial court properly assessed penalties under Section 6040, Revised Statutes of Missouri 1939 (R. S. Mo. 1929, Sec. 5929).

Section 6040, Revised Statutes of Missouri 1939;
Exchange Bank of Novinger v. Turner et al., 321 Mo. 1104, 14 S. W. (2d) 425;
Friedman v. State Mutual Life Ass. Co., 108 S. W. (2d) 156 (Mo. App.);
Clair et al. v. American Bankers Ass. Co., 137 S. W. (2d) 969 (Mo. App.).

IV.

The record and appeal proceedings in this case fully support the holding of the Court of Appeals that the petitioner's appeal from the judgment of the District Court was vexatious under the law of Missouri and the Court of Appeals was justified in awarding respondent damages for vexatious appeal in a sum not to exceed 10 per cent of the amount of the judgment complained of.

Revised Statutes of Missouri 1939, Section 1230;
Rule 31, Paragraph 2, U. S. C. A. (8th);
Bonzon v. Metropolitan Life Ins. Co. (Mo. App.), 143 S. W. (2d) 336;
Polski v. City of St. Louis et al. (Mo. Sup.), 175 S. W. 197, 264 Mo. 458;
Section 1230, Revised Statutes of Missouri 1939;
Rule 31, Par. 2, U. S. C. A. 8th.

ARGUMENT.

I.

The undisputed evidence in this case showed that the insured, at and for several years prior to his death, was hopelessly insane; that he had been incarcerated in two institutions for the care of the insane; that he had been treated by at least three physicians specializing in nervous and mental diseases, who testified that he was continuously insane from the time of their treatment to the date of his death, suffering a condition which medical treatment could not alleviate; that two of his sisters were insane, one of whom committed suicide; that for a period of years the insured was doing unusual, peculiar and horrible things which could not have been classed as other than evidences of insanity, during which time he grew progressively worse and lost weight until he was nothing but skin and bones at the time of his death; that positive evidence of his insanity was furnished petitioner, not only in the proofs of death, but likewise by statements made by the respondent to the petitioner's agent, informing him that the insured was insane and had been treated and confined to institutions for the care of the insane, which information the petitioner's agent and sole representative in its dealings with respondent **admitted** was brought to his attention, but which he also **admitted** he did not investigate or otherwise concern himself about except to notify the home office of the respondent's claim that the insured was insane, and that respondent was requesting payment of the double indemnity benefit.

For the petitioner to suggest that the insured was not insane, in view of the weight of the evidence adduced on the point at trial, is nothing short of absurd, particularly when there was not one word of testimony offered by the petitioner, from lay or medical witnesses—documentary or

otherwise—tending to dispute in any degree the insured's insanity. Petitioner, although fully informed of the insured's insanity, refused to pay the respondent more than $1,500, stating that the company did not pay double indemnity for accidental death.

Nevertheless, in the face of this record, the petitioner contends that a bona fide controversy existed between the petitioner and respondent as to the insanity of the insured. It bottoms its argument on the premise (wholly unsupported by the evidence) that a dispute existed, and it attempts to argue that in refusing to pay the full accidental benefit it acted in good faith. It contends that a distinction exists between the cases cited by the Court of Appeals and the case at bar, in that the case at bar involves a suit on an accident policy and the burden of proof is on the respondent to prove that the insured's death was accidental, and that, until a finding was had showing the insured was insane, the petitioner was justified in presuming that he was sane, as a result of which there was created a doubt as to the petitioner's liability, sufficient to justify a compromise settlement of the liquidated sum involved. In disputing the respondent's request for payment of the accidental benefit under the policy the petitioner tries to say that it acted in good faith and had reasonable grounds for refusing payment.

Under the facts in evidence there **never was the slightest doubt** or question as to the insured's insanity at the time of his death. Not one word of evidence—documentary or otherwise—was produced by the petitioner to so much as indicate that the insured **might have been sane.** The only foundation on which petitioner bottoms its claim that a controversy existed was its refusal to pay and its barefaced claim that a dispute existed. A debtor cannot, by mere refusal to pay a claim, create a dispute sufficient for the purposes of accord and satisfaction (Friedman v. State Mutual Life Ins. Co., 108 S. W. [2d] 156 [Mo. App.]).

While a presumption of sanity may exist under ordinary circumstances, common sense dictates that it could not survive in the face of the type of evidence of the insured's insanity adduced in this record, which evidence of insanity was at all times known to the petitioner. Sanity is presumed only in the **absence** of evidence to the contrary (Brunswick v. Standard Accident Insurance Co., 278 Mo. 154, 213 S. W. 45). To contend otherwise would be utterly subversive of the well-established doctrine, figuratively but strikingly announced by Judge J. Lamm of the Missouri Supreme Court, substantially, to wit: That presumptions are the bats of the law, which the light of evidence frightens and causes to fly away (Mockowik v. Kansas City, St. Joe and C. B. R. Railroad, 196 Mo., l. c. 571).

The evidence disclosed that the insured was found with a bullet hole in his head in an upstairs room in his home with a rifle alongside his body. No one saw the rifle discharged. Under these circumstances, with no other evidence whatever appearing, the petitioner was liable under the accidental death benefit of the policy, the settled law of this state **presuming that he met his death from accidental means** (Andrus v. Business Men's Accident Assn. of America, 283 Mo. 442, 223 S. W. 70).

Petitioner, however, to avoid the effect of the cases cited by the Court of Appeals, contends that they do not involve an action on an accident policy and are therefore distinguishable from the case at bar. It further claims that there is no Missouri case involving an action on an accident policy, holding that a release is void where defendant denied insured's death was accidental. It claims that there is no Missouri case involving a suit on an accident policy holding that a return of the consideration paid to a beneficiary for a release was not required as a condition precedent to the right to maintain an action on the policy. The bases of several other claims made by it are predicated

on facts so different from those in the case at bar as to offer no analogy.

The case of Goodson et al., Resp., v. National Masonic Accident Assn., App., 91 Mo. App. 339, is a suit to recover the unpaid balance due on the **accidental death benefit provision** of a policy of insurance issued by the National Masonic **Accident** Association, arising out of the death of the insured from the **accidental discharge of a pistol** by him. The policy provided that:

> "Benefits in case of **death by accident** are payable to Eunice Graves (wife), if living; if not, to the legal heirs of said member; in all other cases to the member in person."

In this case the insuror, after the death of the insured, paid the widow the sum of $1,000 on a $5,000 face value policy of accident insurance, and took a release in settlement thereof. Thereafter, the widow, coming to believe that she was entitled to the balance due under the policy, in the sum of $4,000, assigned her interest in same for value received to the plaintiffs herein, who brought the suit. **The cause was tried by the Court without the aid of a jury**, and judgment rendered for the plaintiffs.

The Appellate Court, in affirming the judgment for plaintiffs, held that the $5,000 named in the face of the policy was a liquidated amount and that "where a beneficiary settles with the company for the death of her husband for a less sum than the policy called for and gives a receipt in full discharge of the policy, she does not, before suing for the balance, have to return the amount paid nor secure a setting aside of the release, but may, under the statute, try such issue as a part of the whole case."

In discussing this point the Court said (l. c. 351):

> "But whatever opinion my have formerly prevailed, it is now settled by the statute that a plea of fraudu-

lent or wrongful procurement of a release can be set up in plaintiff's reply and that that issue shall be tried by a jury with and as a part of the whole case and a general verdict returned. Section 654 R. S. 1899. . . .

"Defendant insists that when the payment of $1,000 was admitted that that was a consideration. We are not of that opinion. We have already seen that under the contract of insurance defendant owed Mrs. Graves the fixed sum of $5,000. This was a liquidated sum and could not be discharged by the smaller amount unless there was some consideration for it. To say that the payment of the less sum was the consideration, is to argue in a circle. . . .

"But the further insistence is, that when one is tendered a sum of money on condition that it be taken in full of the demand and he accepts the sum tendered, he also, ipso facto, accepts the condition. We so ruled in St. Joseph School Board v. Hull, 72 Mo. App. 403, but that rule presupposes **there is a dispute or disagreement in good faith** as to the amount of the demand. The rule has no application where a part of a claim is accepted under the mistaken view that it was the whole claim. That was this case. . . . Defendant said to her that it only owed her $1,000 and she, laboring under a mistake, thought defendant was right and took the money. Such facts leave no room for the application of the rule stated above." (Emphasis ours.)

The cases of Ock v. Railroad Company, 130 Mo. 27, 31 S. W. 962, and Reede v. Gill & Sons, 201 Mo. App. 457, 212 S. W. 43, cited by the petitioner, are not in point as they involve suits to recover damages for personal injuries and clearly demonstrate that the amounts sued for were not liquidated amounts, but rather unliquidated sums, and that there existed real controversies or disputes at the time the releases were entered into. In other words, those cases involved voidable releases, and not a **void** release, as is presented in the case at bar.

II.

Petitioner, in contending that the rambling note, presented in evidence by the respondent, establishes the insured's sanity, **entirely disregards the evidence** of the phychiatrists, who, in expressing their opinions that the insured was insane at the time of his death, took into consideration the note as well as the other evidence introduced, including their own examinations and findings. Aside from this, however, petitioner is estopped to claim that at the time the $1,500 was paid and the purported release taken, it knew, or had ever heard of the existence of the note. The note first came to the petitioner's attention when the respondent **voluntarily** introduced it in evidence at the trial.

The case of Gates v. Travelers Insurance Company, 218 S. W. 927 (Mo. App.), cited by the petitioner both in its specification of errors (2), and in its argument (II), as authority for establishing insured's sanity as a matter of law, has been overruled by the Supreme Court of Missouri in the case of Rodgers v. Travelers Insurance Company, 311 Mo. 249, 278 S. W. 368, where the Court said (l. c. 372):

> **"The Gates case should be and is overruled as being against the great weight of authority in the United States."**

III.

Under the circumstances disclosed in the record, in the case at bar, the trial court was justified in awarding respondent damages for vexatious delay under Revised Statutes of Missouri 1939, Section 6040.

Clair et al. v. American Bankers Assurance Co., 137 S. W. (2d) 969 (Mo. App.);

Exchange Bank of Novinger v. Turner et al., 321 Mo. 1104, 14 S. W. (2d) 425;

Friedman v. State Mutual Life Assurance Co., 108 S. W. (2d) 156 (Mo. App.).

IV.

The Court of Appeals was justified, after considering the record and appeal proceedings in this case, in awarding respondent damages in an amount equal to 10 per cent of the amount of the judgment, pursuant to Revised Statutes of Missouri 1939, Section 1230, and Rule 31, Par. 2, U. S. C. A. (8th).

Bonzon v. Metropolitan Life Ins. Co., 143 S. W. (2d) 336 (Mo. App.);
Polski v. City of St. Louis et al., 175 S. W. 197, 264 Mo. 458.

In citing the case of Polski v. City of St. Louis et al. (supra), the respondent desires to call the Court's attention to the fact that the petitioner raised for the first time in the Court of Appeals a point that had not been previously raised in the trial court, as an excuse to demand the reversal of the judgment. In the Polski case the Supreme Court of Missouri held:

> "Going outside the issues determined by the trial court for an excuse to demand the reversal of the judgment would seem to be prima facie evidence that the appeal is so frivolous as to justify the taxation of the penalty provided by Section 2084, Revised Statutes 1909" (Section 1230, R. S. Mo. 1939).

The Court of Appeals cited this case as one of several authorities for its holding that the petitioner's appeal was vexatious.

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